THE FIRST STEP ACT AND THE PARDON POWER

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Mercy is a virtue. It implies a lack of worthiness on the part of the person to whom mercy is shown—to release an innocent prisoner is not mercy, but justice. Mercy is an act that overlooks a wrong and acts humanely, with compassion and with a view toward restoration.

But mercy is not the only virtue. And it can work at cross-purposes with others, especially in government. Consider prudence. Exhibiting mercy to a criminal defendant generally means exposing the public to some risk of injury. Prudence may counsel against imposing such risks on innocent third parties. But the zealous distributor of mercy may forget this.

Now consider humility. In a republic like ours, a good public servant realizes that he possesses only limited powers, and that this prevents him from righting every wrong. When government officials arrogate power to themselves in hopes of furthering "preferred policies, even urgent policies," "they always undermine" the "vertical and horizontal separation of powers, the true mettle of the U.S. Constitution, the true long-term guardian of liberty."[1] An over-eagerness to show mercy to every deserving recipient can lead to precisely this sort of arrogation.

The brilliant minds who wrote our Constitution understood all this. That is apparent in their decision to give the President alone the power to grant commutations.[2] The President alone wields the awesome responsibility to spare fellow citizens from the (potentially very serious) consequences of their criminal acts. This vesting of exclusive authority empowers the President to exercise mercy while simultaneously encouraging prudence. Because the responsibility of issuing commutations is the President's alone, the President must live with the consequences—personal and political alike—of showing or denying mercy to a prisoner.

The First Step Act of 2018 upsets this framework. It empowers courts to grant "compassionate release" to prisoners.[3] Courts may reduce a prisoner's sentence if "extraordinary and compelling reasons warrant such a reduction."[4] In other words, the Act empowers courts to issue commutations. It thus reflects a profound lack of humility. Congress, apparently frustrated with Presidents' cautionary approach to commutations, exercised power it lacks: it took from the President, and gave to the courts, the constitutionally assigned responsibility over issuing and denying commutations.

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[1] In re MCP No. 165, 20 F.4th 264, 269 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc).

[2] U.S. CONST. art. II, § 2, cl. 1.

[3] First Step Act of 2018, Pub. L. 115-391, §603(b), 132 Stat. 5194, 5239 (2018).

[4] 18 U.S.C. § 3582(c)(1)(A)(i).

The Act's compassionate-release provisions, by empowering the judiciary to exercise a power that the Constitution gives to the President alone, violates the Constitution. It is terrible policy to boot. In this essay, we address both issues.

I

A

"The Constitution creates a Federal Government of enumerated powers."[5] That "enumeration of powers is also a limitation of powers, because 'the enumeration presupposes something not enumerated.'"[6] "The Constitution's express conferral of some powers makes clear that it does not grant others. And the Federal Government 'can exercise only the powers granted to it.'"[7]

One upshot of these principles is that no branch may exercise powers vested in another.[8] After all, if each of the three branches is limited to exercising its enumerated powers only, then any branch that exercises a power vested in another branch violates the Constitution to the same degree as it would by exercising a power vested in no branch—in either situation, the offending branch exercises power the Constitution does not give it. When a government "function requires the exercise of a certain type of power," "only the branch in which that power is vested can perform it."[9]

B

The United States Constitution vests the President with the "Power to grant Reprieves and Pardons for Offenses against the United States."[10] It vests that power in no other branch. From this, and from the foregoing principles, it follows that no other branch may exercise the pardon power.[11]

What does this pardon power consist of? The "language used in the constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption."[12] At that time, a "pardon" was "a work of mercy," whereby the executive, "either before attainder, sentence or conviction, or after, forg[ave] any crime, offence, punishment, execution, right, title, debt or duty."[13] This definition encompasses commutations, which forgive a "punishment" or "execution" rather than a "crime." Accordingly, the President's

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[5] United States v. Lopez, 514 U.S. 549, 552 (1995).

[6] NFIB v. Sebelius, 567 U.S. 519, 534 (2012) (alteration accepted) (quoting Gibbons v. Ogden, 22. U.S. (9 Wheat.) 1, 195 (1824)).

[7] *Id*. at 534–35 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).

[8] *See*, *e.g.*, Zivotofsky ex rel. Zivotofsky v. Kerry, 576 U.S. 1, 31–32 (2015); Stern v. Marshall, 564 U.S. 462, 484 (2011).

[9] Dep't of Transp. v. Ass'n of Am. Railroads, 575 U.S. 43, 69 (2015) (Thomas, J., concurring); *accord* City of Arlington v. FCC, 569 U.S. 290, 304 n.4 (2013).

[10] U.S. CONST., art. II, § 2, cl. 1.

[11] United States v. Williams, 15 F.3d 1356, 1361 (6th Cir. 1994); *see also* Affronti v. United States, 350 U.S. 79, 83 (1955); *see also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION, Vol. 2, § 1498, 320-321 (Thomas M. Cooley ed., 4th ed. 1873).

[12] Ex parte Wells, 59 U.S. (18 How.) 307, 311 (1855).

[13] *Id*. (quoting Lord Coke, 3 Inst. 233).

pardon power has long been understood to include the power to exercise mercy by commuting a sentence.[14]

II

With these principles in mind, we turn to the First Step Act and its intrusion on the President's prerogatives.

The First Step Act empowers courts, upon motion by a convict, to award "compassionate release." The relevant provision states:

> (A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant's behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant's facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that--
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> (i) extraordinary and compelling reasons warrant such a reduction; or
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> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
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> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission . . . .[15]

This provision empowers courts to reduce an inmate's sentence as an act of mercy; courts may reduce a sentence not because of an error in the original judgment, but for non-legal reasons that a court deems "extraordinary and compelling."[16] A court-imposed sentence reduction justified with reference to non-legal reasons is a commutation by another name. And that presents a rather serious problem: as discussed already, only the President may wield the pardon power.

Congress cannot evade the constitutional division of power by giving the judiciary the power to grant pardons by another name. As the Sixth Circuit observed almost thirty years ago, courts cannot "change" a custodial sentence "into a sentence of probation" once the "convict has begun serving [his] custodial sentence"—to do so would require exercising the pardon power, which the Constitution vested in the President alone.[17] The Supreme Court signaled its agreement about a half century earlier. In *Affronti v. United States*, it interpreted a federal sentencing statute as giving the courts, in cases involving a convict sentenced to consecutive prison terms, no "authority to put [the] convict on probation of an uncommenced term" once "service of an earlier

[14] *Id.* at 314–15; Schick v. Reed, 419 U.S. 256, 263–264 (1974).
[15] 18 U.S.C. § 3582(c)(1).
[16] *Id.*
[17] United States v. Williams, 15 F.3d 1356, 1363 (6th Cir. 1994).

term ha[d] begun."[18] A contrary interpretation, it reasoned, would cause the law to conflict with the President's pardon power.[19]

These cases confirm what the Constitution's text and structure make clear: because courts have no power to grant commutations, they cannot change an already-commenced sentence into something lesser as an act of mercy.[20] To effect such a change is to grant a pardon. And to grant a pardon is to exercise power the Constitution vests in the President alone.

To be clear, accepting our argument would not jeopardize the courts' power to correct legally improper sentences, either on appeal or through reconsideration proceedings. The power to correct erroneous sentences is part and parcel of the "judicial Power" that Article III vests in the federal courts; that power has long been understood to permit review and correction of earlier entered judgments.[21] The conflict with the pardon power arises only when courts change an already-commenced sentence as an act of mercy. Since that is what the First Step Act's compassionate-release provisions invite courts to do, it is unconstitutional.

III

Because the compassionate-release provision is unconstitutional, courts cannot enforce it.[22] And Congress should repeal it. Indeed, Congress would be wise to consider repealing the provision *without regard* to its unconstitutionality. The compassionate-release provision "reflects one particular view about crime and punishment that is ascendant in some quarters today"—a view pursuant to which our criminal-justice system is too harsh on criminals.[23] Whatever one makes of that view generally—we are dubious, to put it mildly—it has little traction in the commutation context.

Begin by considering public safety. Prisons are dangerous places. Most Americans never check in. Barely any take extended stays. Those who do are among "society's most antisocial and violent people," who have either committed a heinous crime or shown a repeated inability to conform to society's behavioral expectations.[24]

The pardon power enables the President to let such individuals loose on society. And it comes with almost no restrictions; the President can unilaterally pardon anyone for any "Offence[] against the United States, except in Cases of Impeachment."[25] He can do so for any reason, or for no reason at all.[26] "The pardon power is, then, a sweeping constitutional power that is checked only by the political process and the power of voters to elect a new President should they disagree

[18] 350 U.S. 79, 83 (1955).

[19] *Id*.

[20] *Williams*, 15 F.3d at 1363–65.

[21] U.S. CONST. art. III, § 1.

[22] *See generally* Br. of Amici Curiae States of Ohio and Montana in Support of Neither Party at 24-27, California v. Texas, 141 S.Ct. 2104 (2021) (Nos. 19-840, 1019); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018).

[23] United States v. Haymond, 139 S. Ct. 2369, 2400 (2019) (Alito, J., dissenting).

[24] Farmer v. Brennan, 511 U.S. 825, 858 (1994) (Thomas, J., concurring).

[25] U.S. CONST. art. II, § 2, cl. 1.

[26] *See* Ex parte Grossman, 267 U.S. 87, 121 (1925).

with the clemency decisions of the current one, or a Congress angry enough to seek impeachment."[27]

That political check is powerful. Most Presidents (and most governors, too), are unwilling to risk their own political futures, or the political futures of their allies, by pardoning a convict who has even a small chance of reoffending.[28]

The political check is complemented by the unitary nature of the executive branch. The Constitution vests all "legislative Powers" it grants "in a Congress of the United States"—a Congress composed of numerous individuals.[29] It vests the "judicial Power of the United States … in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[30] That too amounts to the vesting of authority in multi-member institutions. In sharp contrast, the "executive Power shall be vested in *a* President of the United States of America."[31] The Constitution thus vests the executive power in a single office run by a single person; the "entire 'executive Power' belongs to the President alone."[32] Of course, "it would be 'impossible' for 'one man' to 'perform all the great business of the State.'"[33] Thus, as George Washington recognized long ago, the Constitution permits "lesser executive officers" to "'assist the supreme Magistrate in discharging the duties of his trust.'"[34] But these lesser officers are assistants only. Aside from independent agencies irrelevant for present purposes, the entire executive branch answers to the President. In the folksier language of a twentieth-century successor to Washington, "the buck stops" with the President.[35]

The unitary executive makes the pardon power work. As Joseph Story observed two centuries ago, a "sense of responsibility is always strongest in proportion, as it is undivided."[36] An official who must accept personal responsibility for either continuing a fellow citizen's incarceration or releasing that citizen and risking his reoffending, is "at once a more enlightened dispenser of mercy, and a more firm administrator of public justice."[37] Precisely because the President's power is undivided, the executive branch is "most ready to attend to the force of those motives, which might plead for a mitigation of the rigour of the law; and the least apt to yield to considerations, which were calculated to shelter a fit object of its vengeance."[38]

In sum, political pressures, and the weight of the responsibility conferred by the pardon power, impose important limits where otherwise there are none. The First Step Act, however,

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[27] Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 813 (2015) (footnotes omitted).

[28] *See* Paul Rosenzweig, *Reflections on the Atrophying Pardon Power*, 102 J. CRIM. L. & CRIMINOLOGY 593, 594 (2012) (footnote omitted).

[29] U.S. CONST. art. I, § 1.

[30] U.S. CONST. art. III, § 1.

[31] U.S. CONST. art. II, § 1 (emphasis added).

[32] Seila Law LLC v. CFPB, 140 S.Ct. 2183, 2197 (2020) (quoting U.S. CONST. art. II, § 1).

[33] *Id*. (alterations accepted) (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed. 1939)).

[34] *Id*. (quoting 30 WRITINGS OF WASHINGTON, at 334).

[35] President Harry S. Truman, Motion Picture MP2002-401, Screen Gems Collection, Harry S. Truman Library, [https://perma.cc/SCZ2-YEPH]

[36] STORY, *supra* note 11, at 348.

[37] *Id*. at 349.

[38] *Id*. at 348–49.

evades these limits by vesting a commutation power in the judiciary, "the unelected and politically unaccountable branch of the Federal Government."[39] The judiciary, in addition to being insulated from political pressures, is far from "undivided."[40] Every judge in the entire judiciary exercises only a share of the judicial power, and none reports to any superior in the way the President's subordinates report to him. Thus, at least at the appellate level, no one judge must take sole responsibility for the decision to release a convict early; the responsibility for doing so is likely to be borne by the entire judiciary, or at least shared with other members of the appellate panel. Plus, the judge who commutes the sentence of a convict who goes on to reoffend upon release can always evade responsibility (or find comfort) by claiming that Congress forced his hand. The President, who exercises the unqualified pardon power, has no such luxury.

Congress seems to have treated the judiciary's insulation from political pressures as a feature, not a bug. Remember, the First Step Act empowers courts to grant compassionate release upon a motion filed by either the defendant or "*the Director of the Bureau of Prisons*."[41] The Director of the Bureau of Prisons reports to the President. So the Director could simply ask his superior to commute the sentences of anyone deserving of commutation. But the Act empowers the Director to instead seek a commutation through the courts. There is just one conceivable reason to allow the Director to seek a court order accomplishing something his superior could do directly: Congress believed that, without some mechanism to distance politically accountable actors from the negative effects of early release, few prisoners would be released early.

Congress was almost certainly correct. Because courts are not hemmed in by political and other pressures that apply to the President, the compassionate-release provisions are likely to result in more early releases. At least some of these individuals will go on to assault, maim, rape, and murder law-abiding citizens—citizens well-served by the Founders' choice to vest the pardon power in a politically accountable actor.

While the First Step Act risks public safety, it does so without obviously helping criminal defendants. If sentencing courts know that compassionate release is available years after sentencing, they have one less reason to show mercy when imposing the sentence. A judge may reasonably choose a higher sentence over a lower one, comforted by the fact that he (or one of his peers) can issue a commutation.

Regardless, the Act's instruction to focus on the defendant's difficult circumstances unbalances the determinations that ought to bear on sentencing. The sentencing factors glancingly referred to in the First Step Act include the protection of the public, deterrence, the needs of the defendant, and the seriousness of the crime.[42] But the First Step Act directs courts' attention primarily to the presence or absence of "extraordinary and compelling" circumstances facing *the defendant*.[43] This defendant-first focus risks demeaning the seriousness of the crime. Most people would be unmoved by the suffering of an aged and infirm child rapist. A sentence deters and punishes, but it also represents a statement of society about the degree of the evil

[39] Rucho v. Common Cause, 139 S. Ct. 2484, 2507 (2019).
[40] STORY, *supra* note 11, at 348.
[41] 18 U.S.C. § 3582(c)(1)(A) (emphasis added).
[42] 18 U.S.C. § 3553(a).
[43] 18 U.S.C. § 3582(c)(1)(A)(i).

involved in the underlying crime. The President, elected to make broad decisions applicable to all, is in much better position to balance those interests than the judicial officer whose role is to decide individual cases and controversies.

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We acknowledge the vital role that mercy plays in our system. But there is also a place for protecting the public. The Constitution, by vesting the pardon power in a single executive officer, struck a balance between mercy and protection—a balance that has served us well for almost 250 years. Even if the Constitution permitted Congress to pass a law striking a new balance, we see no reason to run the risk to public safety posed by the compassionate-release provision.